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TABLE OF CASES

Case Caption

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946

Miscellaneous No. 6

Ida M. Picking and Guy W. Picking, Petitioners,

vs.

The Pennsylvania Railroad Company, a corporation, Thomas E. Dewey, Arthur H. James, Herbert H. Lehman, J. Glenn Benedict, J. Henry Smythe, Jr., Watson R. Davison, W. R. Kieffer, H. S. Byers, Louis Costuma, Mary Graham, Edward D. Fitzpatrick, Paul H. Winger, J. L. Pochyba, Samuel D. Mackey, G. J. Sweeney, Roy G. Kell, J. L. Kell, Mrs. J. L. Kell, C. B. Rotz, George Bryant, Paul P. Rao, S. Leighton Frooks, Norman J. Carey, and William M. Rutter, Respondents

BRIEF ON BEHALF OF RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

First opinion of the Circuit Court of Appeals of the Third Circuit is reported in 151 F. (2d) 240. The second opinion, which is a Per Curiam of only one paragraph, is included in the appendix to this book.

STATUTE INVOLVED

The statute here involved is the Civil Rights Act, Act of April 20, 1871, 17 Stat. 13, 8 U.S.C.A., Paragraph 47, jurisdiction being asserted to lie in the District Court by virtue of Section 24 (14) of the Judicial Code as amended, 28 U.S.C.A., Paragraph 41 (14).

STATEMENT

The pleadings and petitions in this case are so repetitious and garbled that it is impossible to answer them in detail. In order to more clearly present the issues raised by the petition, the respondent desires to recite a restatement of the case in a form shorter and more concise than that contained in the petition.

The action was originally brought against The Pennsylvania Railroad Company, Thomas E. Dewey, Governor of New York, and his predecessor, Herbert H. Lehman, Arthur H. James, at that time Governor of Pennsylvania, and numerous minor defendant police officers, justices of the peace, the Judge of the Court of Common Pleas of Franklin County, Pennsylvania, and William M. Rutter, the principal Deputy Attorney General of Pennsylvania, on the ground of a conspiracy, inter alia, to deprive the plaintiffs of their civil rights and for false arrest. The appeal in this case involved only the dismissal of The Pennsylvania Railroad Company as a party defendant, and as the record now stands, the other parties are still in court and in due course may come to a jury trial.

It is impossible to determine what the plaintiff seeks in her appeal but obviously she is undertaking to reopen the whole case rather than to review the issue passed upon by the Circuit Court of Appeals.

The position of The Pennsylvania Railroad Company is and always has been that under the facts as alleged in the complaint, there is no basis for a cause of action.

Statement

Stating the facts as alleged in the complaint as the basis of the cause of action, but in their chronological order instead of in the sequence as pleaded, we have the following:

On November 1, 1940, the plaintiffs were arrested in New York City and charged with a misdemeanor of placing an advertisement on a flag of the United States in violation of subdivision 16, paragraph a of Section 1425 of the Penal Code of New York. After convictions, the plaintiffs were put upon parole, but on February 5, 1941, Mrs. Picking's parole was revoked and a bench warrant issued for her.

It appeared that the plaintiffs could not be found in the State of New York and, on September 8, 1941, an affidavit of flight was made by defendant Bryant, a New York policeman, stating that he was informed that the plaintiffs had been arrested in Chambersburg, Pennsylvania, and were in custody there "pending the action of the executive of this state in the institution of proceedings for extradition".

On September 9, 1941, District Attorney Dewey issued a request to the defendant Herbert H. Lehman, then Governor of New York, for a requisition by the defendant Arthur H. James, then Governor of Pennsylvania, seeking the extradition of the plaintiffs as fugitives from the justice of the State of New York. Governor Lehman issued a request to Governor James for the arrest and extradition of the plaintiffs and on September 13, 1941, an Assistant Deputy Attorney General of Pennsylvania informed Governor James, in writing, that the request for rendition of the plaintiffs was in due form and complied with all the requirements of the law.

Statement

On September 13, 1941, a Governor's warrant was issued by Governor James for the arrest of the plaintiffs and on September 15, the defendants, the police officers, arrested the plaintiffs in Chambersburg, Franklin County, Pennsylvania, and transported them by automobile a distance of fifty miles to Harrisburg, and thence to New York City over The Pennsylvania Railroad.

On the same day, the defendant company is alleged to have completed the transportation after actual notice to its agent, who wore the usual uniform of the company, that it was acting unlawfully. The notice is claimed to have been that the plaintiffs were transported as prisoners under the alleged authority of purported warrants for arrests and extradition issued by Governor James. It is further alleged that the plaintiffs had been deprived of their rights to be taken before a court of record; that a discrepancy existed between the dates of the warrants and the dates of the returns, which established the invalidity; and finally that the plaintiffs had not waived their right to extradition nor the right to challenges by habeas corpus proceedings.

A more detailed recital of the facts is found in the original opinion of the Circuit Court of Appeals in Picking v. Pennsylvania Railroad Company, 151 Fed. (2d) 240, see pages 244-245.

A motion was filed to dismiss the case against The Pennsylvania Railroad Company on the ground that the complaint, on its face, failed to state a cause of action upon which relief could be granted. Similar motions were also filed by the other defendants.

These motions were subsequently sustained by the District Court, but on appeal the judgment of the District

Court was reversed and the case remanded with what amounted to directions from the Circuit Court to the District Court to require plaintiffs to file a more specific statement as to the alleged participation of The Pennsylvania Railroad Company in the so-called conspiracy, together with certain qualifying remarks, which we will discuss later. Subsequently, the lower Court directed the plaintiffs to file such an amended statement, which they did under date of April 11, 1946.

Continuing the paraphrasing of the pleadings; the amended statement, in paragraph 161, alleges that the defendant railroad company "took, on September 15, 1941, by its agents, a brakeman and a conductor, on said train, a money bribe from defendant, Mary Graham, for said illegal transportation", and in paragraph 162, alleges that a "brakeman whose name is to the plaintiffs unknown, together with defendant, Fitzpatrick, violently pushed plaintiff Ida M. Picking * * * upon the iron steps of the train coach causing her to fall and further injure herself about her arms, hands and knees". These last two amendments contain the only allegations of conspiracy on the part of The Pennsylvania Railroad Company other than those recited in the original complaint.

A second motion was filed to dismiss the case against The Pennsylvania Railroad Company on the grounds that the complaint as amended on its face, failed to state a cause of action upon which relief could be granted. (A full copy of the motion is printed in the appendix, pages 24, 25).

The Court, on June 1, 1946, granted the motion of The Pennsylvania Railroad Company to dismiss the complaint. This dismissal was in substance on the ground that the

railroad company was shown by the complaint, as amended, to have done nothing more than perform its duty as common carrier in transporting, as passengers, the plaintiffs, in the custody of officers of the law, in possession of warrants, valid on their face. (A complete copy of the opinion is printed in the appendix, pages 19–23).

The judgment sustaining the motion of The Pennsylvania Railroad Company to dismiss the complaint was dated June 1, 1946. On June 10, 1946, the plaintiffs filed motion to vacate the order of dismissal and asking leave to amend their complaint. Under date of June 14, 1946, the Court denied this motion. As admitted by the appellants, an appeal was taken from the judgment of June 1, 1946, on September 9, 1946, after the statutory time for taking such appeal had lapsed.

The Circuit Court of Appeals, under date of March 21, 1947, filed the following Per Curiam opinion:

"Per Curiam:

> "Assuming arguendo that the appeal at bar was taken within the period prescribed by the statute, a question which we do not decide, we are of the opinion none the less that the court below committed no error in dismissing the plaintiffs' motion to vacate the order of dismissal as to The Pennsylvania Railroad Company filed June 1, 1946. Accordingly the order appealed from will be affirmed."

ARGUMENT

I.

There Is Nowhere in the Complaint Any Allegation of Any Fact Indicating Any Participation in, or Knowledge of Any Conspiracy on the Part of the Pennsylvania Railroad Company or Any of Its Officers, Agents, or Employees; nor Any Allegation that the Said Company Did Anything with Respect to the Events Therein Set Forth other than To Transport, as a Common Carrier, the Complainants While in the Custody of the Officers of the Law.

Defendant's Motion To Dismiss Amended Complaint, Paragraph (a)

The gravamen of this complaint is based on a conspiracy to injure the plaintiff. But there is nothing in the paragraphs to which we have referred, or in any other part of the complaint, which alleges that The Pennsylvania Railroad Company did anything other than transport the plaintiffs while in the custody of police officers. There is no allegation of improper confinement, and the only possible conclusion that can be drawn from the language of the complaint is that the railroad company did not refuse to transport the plaintiffs while in the custody of the police

officers, notwithstanding the fact that they were held by the officers under authority of warrants valid on their face, and the plaintiffs had accordingly assumed the status of regular passengers.

In such circumstances, it not only was the duty of the railroad company, as a carrier, to transport any passengers who demanded service, but it would have rendered itself liable for both civil damages and statutory penalties if it had refused or failed to do so.

The Circuit Court of Appeals, in its opinion, remanding the case, held that:

> "The corporate defendant, The Pennsylvania Railroad Company, however, is not an agency of any state. It is a privately owned railroad corporation. It has moved to dismiss the complaint upon the ground inter alia, that 'There is nothing in the allegations of the Complaint that the Pennsylvania Railroad Company did other than transport as a common carrier the complainants while in the custody of officers of the law.' But if, as the plaintiffs assert, this defendant 'materially and physically participated in' all the alleged unlawful acts of September 15, 1941, it may have joined in, or as the plaintiffs put it, 'adopted', the conspiracy as its own. The complaint does not explain how the corporate defendant intra vires could have done so. If the Railroad Company upon the demand of officers of Pennsylvania or New York did nothing more than transport the plaintiffs from Harrisburg to New York City, the plaintiffs being then in the custody of peace officers on warrants valid on their face, the Railroad Company can scarcely be held to have participated in

a conspiracy to deprive the plaintiffs of rights guaranteed to them by the Fourteenth Amendment."

Picking vs. P.R.R. Co., et al., 151 Fed. (2d), see page 249.

"It is well established that a common carrier by railroad is required to accept for transportation as passengers persons in the custody of peace officers under a warrant valid on its face and that a common carrier refusing to accept such a person for transportation is liable for a penalty. Duggan v. Baltimore & Ohio R. Co., 159 Pa. 248, 28 A. 182. See also Burton v. New York Central & H. R. Co., 147 App. Div. 557, 132 N. Y. Supp. 628; Chesapeake & Ohio R. Co. v. Pack, 192 Ky. 74, 232 S. W. 36; Bowden v. Atlantic Coast Line Ry. Co., 144 N. C. 28, 56 S. E. 558; Brunswick & Western R. Co. v. Ponder, 117 Ga. 63, 43 S. E. 430, 60 L.R.A. 713. The employees of a railroad company are not required, as the plaintiffs apparently assert, to constitute themselves a court of law in order to determine whether extradition proceedings were validly conducted before accepting as a passenger for transportation a person subject to extradition held upon a warrant valid on its face."

Picking vs. P.R.R. Co., et al., 151 Fed. (2d), see page 253.

As it will be noted, the language in the principles announced in the foregoing paragraph are sustained by a long line of authorities which it is not necessary to quote in detail. We might add that in many of these cases the arrests were made on the actual premises of the carrier, or

even in the cars, and it was nonetheless held that the railroad's duty to transport continued to apply. A fortiori, in the present case, where the arrest was made prior to the assumption by the prisoners of the status of passengers, and where the railroad company plainly did not have any notice of the circumstances of the arrest except for what appeared on the face of the valid warrants, in such circumstances, the railroad company's duty to transport necessarily applied. Here the plaintiffs arrived at Harrisburg, after a journey of fifty miles by automobile, in the custody of the police officers. The arrests had been made in Franklin County and the commitment had been ordered, after protest, by the duly constituted authorities. The female plaintiff was held at the ladies' room in the custody of a policewoman and both plaintiffs were subsequently transported to New York. There was nothing whatsoever to place the defendant company upon notice that the arrest was illegal or the extradition proceedings improper except some vague statement to some uniformed employees.

II.

The Averments in the Amended Complaint Completely Fail To Establish that the Defendant Company " 'Materially and Physically Participated in' All the Alleged Unlawful Acts of September 15, 1941", or that It " 'Adopted' the Conspiracy as Its Own".

Defendant's Motion To Dismiss Amended Complaint, Paragraphs (b) and (c).

A careful reading of the original complaint and the opinion of the Circuit Court can lead but to one conclusion, namely, that under the facts as averred in the original complaint, the plaintiffs had no case against the railroad company. We must, therefore, examine the additional averments made in the amendment to the complaint, to see whether or not they, in any way, sustain the charge of conspiracy.

In Paragraph 161, there is the allegation that an unidentified brakeman or conductor accepted a money bribe from the defendant, Mary Graham, the policewoman, for said illegal transportation. This, if true, of and in itself has no bearing on the case at all. If the reverse were true and the defendant's employees had accepted a bribe to refuse transportation, the circumstance might be relevant, but it was the duty of The Pennsylvania Railroad Company to transport these people in the custody of the police officers of the State of New York. It had no alternative and if its employees accepted a bribe to do what they were required by the law to do, such action, in no way, constituted a conspiracy on the part of the defendant company.

In other words, the alleged acceptance of the bribe in no way affected the duties of the carrier or made it a party to whatever had occurred in Chambersburg, or in the offices of the Governors of New York and Pennsylvania.

In Paragraph 162, we have the allegation that an unknown brakeman "violently pushed plaintiff, Ida M. Picking, * * * upon the iron steps of the train coach causing her to fall and further injure herself about the hands, arms and knees". This averment likewise in no way enlarges the allegations of the conspiracy, nor does it charge the defendant company with any participation therein. At the most, it is an allegation of a separate and distinct tort by the employees of the defendant company and as such, a cause of action outlawed by the Pennsylvania Statute of Limitations (Act of June 24, 1895, P. L. 236, Section 2), since the event is alleged to have occurred on September 15, 1941, and the amended complaint was filed on April 11, 1946, which was after the expiration of the two-year statutory period for tort actions. That such additional cause of action cannot be introduced after the running of the Statute is fundamental law for which it is hardly necessary to cite authorities:

> "It is elementary that after the Statute of Limitations has run a plaintiff cannot amend his statement by introducing a new cause of action."
>
> *Cox vs. Wilkes-Barre Ry. Corp.,* 334 Pa. 568.
>
> "After the Statute of Limitations has run, a plaintiff cannot by amendment shift his ground of complaint, introduce a new cause of action * * *."
>
> *Hartley vs. Pennsylvania Railroad Company,* 318 Pa. 566.

Argument

"The rule that a new cause of action barred by the Statute cannot be introduced by amendment is well settled in Pennsylvania."

Commercial Credit Co. vs. County of Northumberland, 23 F. Supp. 747 (opinion by Judge Johnson, Middle District of Pennsylvania).

See also *Vale's Penna. Digest Limitation of Actions,* Sec. 127 (11).

III.

The Governor's Warrant for the Arrest of Guy W. Picking Was Identical with That Issued for the Arrest of Ida M. Picking and Constitutes a Valid Defense under the Defendant's Motion to the Specific Charge of Illegal Transportation.

Defendant's Motion To Dismiss Amended Complaint, Subparagraph (e)

We have already quoted the language of the Circuit Court holding that employees of a railroad company are not required to pass upon the validity of extradition proceedings. We quote further where the Court, speaking upon the validity of the warrants, said:

"* * * The warrant for Mrs. Picking, however, is valid upon its face and is not invalidated at least insofar as the corporate defendant is concerned by reason of the apparent discrepancy between the date

of issuance of the warrant and the date of its execution. * * *

"We may not assume, however, that the governor's warrant for the arrest of Guy W. Picking was valid on its face since it is not before us. If upon remand the governor's warrant for Guy W. Picking is made a part of the record and it is similar in tenor to the governor's warrant issued for the arrest of Ida M. Picking, it will constitute a valid defense under the Railroad Company's present motion to the specific charge of illegal transportation.

"The court below would have been correct in dismissing the third cause of action as to The Pennsylvania Railroad Company insofar as Mrs. Picking is concerned if the complaint contained no allegations other than those relating to the specific charge of illegal transportation. The complaint goes further, however, and in effect alleges that The Pennsylvania Railroad Company took part in a general conspiracy to arrest and imprison the plaintiffs. The plaintiffs should be compelled to draw out their present allegations and particularize them. If the matter which thus comes into the pleading contains nothing more relevant to the charge of conspiracy on the part of the Railroad Company than is now asserted in the complaint, the suit should be dismissed as to The Pennsylvania Railroad Company insofar as any claim asserted by Mrs. Picking is concerned. A like ruling will be appropriate as to any claim asserted by Guy W. Picking against the Railroad Company if it shall appear that he was arrested under a governor's warrant valid on its face."

Picking vs. The P.R.R. Co., 151 Fed. (2d), 254.

Attached to the amended complaint was a copy of the warrant for Guy W. Picking, which was exactly the same as the one issued for Mrs. Picking. On this point, we have the finding of the District Court as follows:

> "As to the first cause of action I find from the exhibit attached to Plaintiff's Amended Complaint that the governor's warrant issued for the arrest of Guy W. Picking is identical in form with that issued for the arrest of Ida M. Picking. * * *"
>
> "As to the third cause of action a similar situation exists. The two warrants being identical, there can be no charge of illegal transportation and as discussed above the allegations as to a bribe and a tort by an employee of the Defendant do not in any way contain anything 'more relevant to the charge of conspiracy on the part of the Railroad Company' than has already been asserted in the Complaint."

IV.

The Second Appeal to the Circuit Court of Appeals Was Confined Solely to the Question Whether or Not the Lower Court Erred in Sustaining the Motion of the Pennsylvania Railroad Company To Dismiss the Complaint against It. None of the Other Appellees Were Made Party to the Appeal nor Did They Appear at the Argument.

The practical effect of these two appeals was to give the petitioner an opportunity to argue twice the question of the participation of The Pennsylvania Railroad Company in the alleged conspiracy. In the first opinion, Senior Circuit Judge Biggs held that under the facts as alleged the plaintiffs had no case against The Pennsylvania Railroad Company but gave them an opportunity to amend their complaint in an effort to allege a cause of action. As we have pointed out, the amendments completely failed to show any participation by the respondent company in the alleged conspiracy. These amendments are discussed in detail by District Judge Watson in an opinion which we have printed in the appendix and his conclusions thereupon have been confirmed by a Per Curiam decision of the Circuit Court of Appeals. So it will be seen that not only has the petitioner been allowed to present her case twice before the Circuit Court of Appeals, but also that the effect of her amendments has been considered in detail and decided adversely to her contentions by both courts below.

In conclusion, therefore, we submit that to allow the certiorari in this case would be to permit these plaintiffs,

who have already had their day in court twice, to occupy the time of this Court with questions, which are of no public interest or importance. The present decision of the Circuit Court of Appeals decides nothing except that the petitioners have failed to allege anything against the respondent company other than that it fulfilled its duties as a common carrier in transporting the petitioners while in the custody of officers of the law.

It is, therefore respectfully submitted that the petition should be denied.

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APPENDIX

OPINION OF THE CIRCUIT COURT OF APPEALS

Before Biggs, Goodrich and McLaughlin, Circuit Judges.

(Filed March 21, 1947)

Per Curiam:

Assuming arguendo that the appeal at bar was taken within the period prescribed by the statute, a question which we do not decide, we are of the opinion none the less that the court below committed no error in dismissing the plaintiffs' motion to vacate the order of dismissal as to The Pennsylvania Railroad Company filed June 1, 1946. Accordingly the order appealed from will be affirmed.

OPINION

This case is again before the Court, this time on a motion by the Defendant, The Pennsylvania Railroad Company, to dismiss Plaintiffs' Amended Complaint as to The Pennsylvania Railroad Company, hereinafter referred to as the Defendant.

This Court, in an opinion filed February 11, 1946, directed the Plaintiffs to file a more definite complaint

in regard to the Defendant in accordance with an opinion of the Circuit Court of Appeals in Picking, et al. vs. Pennsylvania R. R. Co., et al., 151 F. 2d 240, and Plaintiffs did file an amended complaint which the Defendant now moves to dismiss.

The Circuit Court of Appeals, in a well reasoned opinion by Judge Biggs, divided the Complaint into three actions, the second of which was eliminated by that Court.

As to the first cause of action against the Defendant, the Court said: "If the Railroad Company upon the demand of officers of Pennsylvania or New York did nothing more than transport the Plaintiffs from Harrisburg to New York City, the plaintiffs being then in the custody of peace officers on warrants valid on their face, the Railroad Company can scarcely be held to have participated in a conspiracy to deprive the plaintiffs of rights guaranteed to them by the Fourteenth Amendment. Neither the defendant corporation nor any of the other defendants moved for a more definite statement of the plaintiffs' claim or for a bill of particulars pursuant to Rule 12 (e). * * * In the absence of such action by the Railroad Company we may not conclude that the plaintiffs have not stated a valid cause of action under the Civil Rights Act against it." Following the filing of the opinion, the Defendant did so move for a more definite statement, and an amended complaint was filed.

As to the third cause of action, the Circuit Court of Appeals said: "The court below would have been correct in dismissing the third cause of action as to The Pennsylvania Railroad Company insofar as Mrs. Picking is concerned if the complaint contained no allegations other than those relating to the specific charge of illegal trans-

portation. The complaint goes further, however, and in effect alleges that The Pennsylvania Railroad Company took part in a general conspiracy to arrest and imprison the plaintiffs. The plaintiffs should be compelled to draw out their present allegations and particularize them. If the matter which thus comes into the pleading contains nothing more relevant to the charge of conspiracy on the part of the Railroad Company than is now asserted in the complaint, the suit should be dismissed as to The Pennsylvania Railroad Company insofar as any claim asserted by Mrs. Picking is concerned. A like ruling will be appropriate as to any claim asserted by Guy W. Picking against the Railroad Company if it shall appear that he was arrested under a governor's warrant valid on its face."

"The warrant for Mrs. Picking, however, is valid upon its face and is not invalidated at least insofar as the corporate defendant is concerned by reason of the apparent discrepancy between the date of issuance of the warrant and the date of its execution."

"It is well established that a common carrier by railroad is required to accept for transportation as passengers persons in the custody of peace officers under a warrant valid on its face and that a common carrier refusing to accept such a person for transportation is liable for a penalty (cases cited). If upon remand the governor's warrant for Guy W. Picking is made a part of the record and is similar in tenor to the governor's warrant issued for the arrest of Ida M. Picking, it will constitute a valid defense under the Railroad Company's present motion to the specific charge of illegal transportation."

I have cited portions of the opinion at length because of the peculiar nature of this case and the parties involved and because I intended to confine my decision to the issues.

As to the first cause of action I find from the exhibit attached to Plaintiffs' Amended Complaint that the governor's warrant issued for the arrest of Guy W. Picking is identical in form with that issued for the arrest of Ida M. Picking. To find whether it is alleged that the Defendant did "more than transport the plaintiffs from Harrisburg to New York City" I refer to the Amended Complaint. Three paragraphs, 160, 161 and 162, refer to the part the Defendant is alleged to have taken in the conspiracy. Paragraph 160 alleges only that the Defendant "unlawfully conspired . . . to transport Plaintiffs without authority of law in Interstate Commerce" which adds nothing to the allegations contained in the original complaint. Paragraph 161 reiterates the alleged illegal transportation and adds an allegation that the Defendant took, "by its agents, a brakeman and a conductor, on said train, a money bribe from defendant, Mary Graham, for said illegal transportation". The Circuit Court of Appeals has said that the warrant of removal of Ida M. Picking was valid on its face as to the Defendant and that in fact the Defendant was legally bound to accept her on that ground. So the alleged bribe cannot be held to be a part of a conspiracy when the act of so accepting Plaintiffs for transportation was required by law and refusal by a common carrier so to act imposes liability for a penalty. Paragraph 162 contains the allegation that an unknown brakeman "violently pushed plaintiff, Ida M. Picking, * * * upon the iron steps of the train coach causing her to fall and further injure herself about the hands, arms and knees." This averment likewise in no way enlarges the allegations of the conspiracy, nor does it charge the Defendant Company with any participation therein. At the most, it is an allegation of a separate and distinct tort by the employees of

the Defendant Company and a cause of action outlawed by the Pennsylvania Statute of Limitations, Act of June 24, 1895, P. L. 236, Sec. 2. Such an additional cause of action cannot be introduced after the running of the Statute. Cox vs. Wilkes-Barre Ry. Corp., 334 Pa. 568; Hartley vs. Pennsylvania Railroad Company, 318 Pa. 566; Commercial Credit Co. vs. County of Northumberland, 23 F. Supp. 747.

As to the third cause of action, a similar situation exists. The two warrants being identical, there can be no charge of illegal transportation and as discussed above the allegations as to a bribe and a tort by an employee of the Defendant do not in any way contain anything "more relevant to the charge of conspiracy on the part of the Railroad Company" than has already been asserted in the Complaint.

Now, June 1, 1946, the motion of the Pennsylvania Railroad Company to dismiss the Complaint is granted and it is ordered that the action be and hereby is dismissed as to The Pennsylvania Railroad Company.

(s) ALBERT L. WATSON
United States District Judge

MOTION TO DISMISS AMENDED COMPLAINT

And now, The Pennsylvania Railroad Company respectfully moves your honorable Court to dismiss the above complaint for the following reasons:

1. The complaint as amended, on its face, fails to state a claim of action upon which relief can be granted because—

(a) There is nowhere in the complaint any allegation of any fact indicating any participation in, or knowledge of any conspiracy on the part of The Pennsylvania Railroad Company or any of its officers, agents, or employes; nor any allegation that the said company did anything with respect to the events therein set forth other than to transport, as a common carrier, the complainants while in the custody of the officers of the law.

(b) The bare allegation as contained in Paragraph 161 of the amended complaint that an unidentified agent of the defendant company accepted a money bribe from the defendant, Mary Graham, a duly commissioned policewoman of the State of New York, does not constitute a conspiracy on the part of The Pennsylvania Railroad Company.

(c) The allegation as contained in Paragraph 162 that the unidentified brakeman violently pushed the plaintiff, Ida M. Picking, upon the steps of the train coach does not constitute any participation in, or adoption of, the conspiracy by The Pennsylvania Railroad Company, to deprive the plaintiffs of their civil rights but, if true, is a separate and distinct tort by the employees of the said

defendant company and the cause of action therefor is outlawed by the Statute of Limitations.

(d) The statements contained in Paragraphs 161 and 162 of the amended complaint purport to set forth a new cause or causes of action other than that allegedly set forth in the original complaint, and said new cause or causes of action are barred by the Statute of Limitations.

(e) The Governor's Warrant for the arrest of Guy W. Picking is similar in tenor and identical with that issued for the arrest of Ida M. Picking and constitutes a valid defense under the defendant's motion to the specific charge of illegal transportation.

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May 1, 1946